Petition

81-1378

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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

BOBBY LEE MINTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

and

SAMUEL ELLIS FERGUSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government can convict the petitioners of involvement in a conspiracy without any evidence disclosing that they entered into the conspiracy with knowledge of the conspiracy as required by the decision of this Court in *United States* v. *Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940)?

2. Whether the government can prove importation of contraband by merely showing a foreign origin without evidence showing that the petitioners, or any other defendants, were involved in the importation, in conflict with the decision of the United States Court of Appeals for the Ninth Circuit?

3. Whether the government can bolster a weak case by showing implausible statements made by the petitioners to extricate themselves where other evidence of guilt is as consistent with petitioners' innocence as it is to the government's theory of guilt, in conflict with the decisions of the United States Courts of Appeals for the Second and Sixth Circuits?

LIST OF ALL PARTIES SEEKING REVIEW

Bobby Lee Minton and Samuel Ellis Ferguson are the only parties seeking review of the judgments against them.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bobby Lee Minton and Samuel Ellis Ferguson, petitioners herein, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, entered October 26, 1981, affirming the judgment of conviction of the petitioners in the United States District Court for the Eastern District of North Carolina.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the Appendix attached hereto as Exhibit "A".

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit, dated October 26, 1981, was entered on the same day. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

After the United States Court of Appeals for the Fourth Circuit rendered its decision on October 26, 1981, the petitioners, on November 9, 1981, under Rule 40 of the Federal Rules of Appellate Procedure, petitioned for a rehearing and on December 14, 1981, the United States Court of Appeals for the Fourth Circuit denied the petitioner's petition for rehearing.

STATEMENT OF THE CASE

The petitioners were tried in the United States Court for the Eastern District of North Carolina at Wilmington, North Carolina, before a jury on September 29, 1980 to October 7, 1980, on a bill of indictment charging each defendant, including the petitioners, with violations as follows:

The Grand Jury charges:

First Count

That beginning on a date prior to the 4th day of July, 1979, and continuing thereafter until or about the 9th day of July, 1979, in the Eastern District of North Carolina, within the jurisdiction of this Court, and elsewhere, VICTOR JACOB SENI, BOBBY LEE MINTON, SAMUEL ELLIS FERGUSON, WAYNE DOUGLAS HENDERSON, HECTOR MORALES, CARLOS FIUZA and PABLO RAUL ALONSO, the defendants herein, did knowingly and intentionally combine, conspire, confederate and agree together, with each other, and with diverse other persons, whose names are to the Grand Jury unknown, to violate Title 21, United States Code, Sections 841(a)(1), 952(a), and 960(a)(1), and Title 18, United States Code, Section 2.

It was the object of said conspiracy that the defendants and alleged co-conspirators would knowingly, intentionally, and unlawfully import into the United States of America from a place outside thereof, approximately fifteen (15) tons of a Schedule I controlled substance, to wit: marihuana, in violation of the provisions of Title 21, United States Code, Sections 952(a) and 960(a)(1), and Title 18, United States Code, Section 2.

It was the further object of said conspiracy that the defendants and alleged co-conspirators would knowlingly, intentionally, and unlawfully possess with intent to distribute approximately fifteen (15) tons of a Schedule I controlled substance, to wit: marihuana, in violation of the provisions of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, the defendants and co-conspirators performed the following overt acts:

1. That on or about the 7th day of July, 1979, the defendants VICTOR JACOB SENI, HECTOR MORALES and other co-conspirators whose names to the Grand Jury are unknown, arrived at the Rodeway Inn, Wilmington, North Carolina, and occupied rooms.

2. That on or about the 8th day of July, 1979, the defendants VICTOR JACOB SENI, HECTOR MORALES, WAYNE DOUGLAS HENDERSON, CARLOS FIUZA, PABLE RAUL ALONSO, BOBBY LEE MINTON, SAMUEL ELLIS FERGUSON and other co-conspirators whose names to the Grand Jury are unknown, traveled to an area in Brunswick County, North Carolina, known as the Oak Island Marina.

3. That on or about the 8th day of July, 1979, the defendants, VICTOR JACOB SENI, HECTOR MORALES

and other co-conspirators whose names to the Grand Jury are unknown, boarded a fishing vessel, the "Queen Elizabeth" in the inland waters of North Carolina at the Oak Island Marina in Brunswick County, North Carolina, said fishing vessel containing approximately fifteen (15) tons of a Schedule I controlled substance, to wit: marihuana.

4. That on or about the 8th day of July, 1979, the defendants, VICTOR JACOB SENI, HECTOR MORALES, WAYNE DOUGLAS HENDERSON, BOBBY LEE MINTON, SAMUEL ELLIS FERGUSON, CARLOS FIUZA, PABLO RAUL ALONSO and other co-conspirators whose names are to the Grand Jury unknown, transferred or aided and abetted in the transfer of approximately fifteen (15) tons of marihuana from the fishing vessel, "Queen Elizabeth" to several trucks which were located at the Oak Island Marina in Brunswick County, North Carolina.

Said acts, and other over acts not known to the Grand Jury, being committed in furtherance of said conspiracy to violate the provisions of Title 21, United States Code, Sections 952(a), 960(a)(1), and 963.

Second Count

That beginning on or about the 8th day of July, 1979, and continuing thereafter until on or about the 9th day of July, 1979, in the Eastern District of North Carolina, VICTOR JACOB SENI, BOBBY LEE MINTON, SAMUEL ELLIS FERGUSON, WAYNE DOUGLAS HENDERSON, HECTOR MORALES, CARLOS FIUZA and PABLO RAUL ALONSO, did knowingly, intentionally, and unlawfully import, and did knowingly, intentionally, and unlawfully aid and abet each other in importing into the United States from a place outside thereof, approximately fifteen (15) tons of a Schedule I controlled substance, to wit: marihuana, in violation of the provisions of Title 21, United States Code, Sections 952(a) and 960(a)(1), and Title 18, United States Code, Section 2.

Third Count

That on or about the 9th day of July, 1979, in the Eastern District of North Carolina, VICTOR JACOB SENI, BOBBY LEE MINTON, SAMUEL ELLIS FERGUSON, WAYNE DOUGLAS HENDERSON, HECTOR MORALES, CARLOS FIUZA and PABLO RAUL ALONSO, knowingly and intentionally did unlawfully possess with intent to distribute and did knowingly, intentionally, and unlawfully aid and abet each in possessing with intent to distribute approximately fifteen (15) tons of a Schedule I controlled substance, to wit: marihuana, in violation of the provisions of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

At the close of the Government's evidence and at the close of all the evidence, the Court overruled all defendants' — including the petitioners' — motions for judgment of aquittal. (Tr., pp 775-809, 835).

All of the defendants, including the petitioners, requested that the Court charge the jury according to their request on the burden of the Government to prove importations and the Court did not charge on the point requested. (App. 81, 132) (Tr., pp 1022-1027).

The jury failed to agree on a verdict as to one defendant and a mistrial was had as to him — whose name was Wayne Douglas Henderson.

The jury found the petitioners and the other defendants guilty as charged and judgment was pronounced, as to the petitioners, as follows:

The petitioners Ferguson and Minton were sentenced as follows:

Count One: Five years.

Counts Two and Three: (These counts were consolidated) — these petitioners were sentenced to five years to run consecutive

to Count One with two year parole eligibility added. (App. 126-131).

From the judgment of the Court for the Eastern District of North Carolina, the petitioners duly appealed to the United States Court of Appeals for the Fourth Circuit.

RELEVANT FACTS

The charges arose from the early morning discovery of fifteen tons of marijuana found at the Oak Island Marina on an inland waterway in Brunswick County, North Carolina (Tr., pp 55-56, 436-438). Burlap bales of marijuana were found in the hold of a shrimper, the Queen Elizabeth, and in a truck at the marina. (Tr., pp 60-61).

The government introduced a nautical map found in the pilot house of the Queen Elizabeth showing a line drawn outside the twelve mile limit. (Tr., pp 604-607, 650-666). The undisputed evidence disclosed that the line stops at excellent fishing territory. (Tr., pp 814-816).

The marina was located off of North Carolina Highway 133 which also leads to Long Beach and other places. (Tr., pp 53-54). A roadblock was set up near the intersection of N.C. Highway 133 and N.C. Highway 211 about 100 yards down Highway 133 from Highway 211. (Tr., p 232). The petitioner Ferguson came from the west on Highway 211, which runs east to Southport, North Carolina, and turned into a service station which was also large enough to be known as a community store and stopped. (Tr., pp 235, 298). When petitioner Ferguson turned off of Highway 211 into the service station, the officer at the roadblock could not see him and he could not see the officer because the view was blocked by the service station or community store. (Tr., p 299). The evidence is conflicting as to where the vehicle driven by Ferguson was pointing after it was stopped. One officer testified that it was pointed in the direction of the roadblock and another testified that it was pointed to-

wards the angle of the intersection which would be away from the roadblock. (Tr., pp 242, 349). There is no doubt, however, from the evidence that the van-type vehicle which the petitioner Ferguson was operating never at any time entered into Highway 133 (Tr., p 286), and the service station or community store is located about five miles from the seized 15 tons of marijuana. (Tr., p 203). The van-type truck was similar to the two trucks at the site of the marina, however, there is no evidence that the truck had ever been to the marina. The van-type truck being driven by petitioner Ferguson was registered in the name of someone other than him and appeared to be empty (Tr., pp 288, 498); however, upon scratching around on the floor of the van compartment, officers discovered a very small quantity of marijuana, as shown by Exhibit No. 51. (Tr., p 498). This marijuana was never shown to have any connection whatsoever with the 15 tons of marijuana at the marina and the only reasonable inference from this small quantity of marijuana was that it came from hauling at some other time by a person unknown. There is no evidence that the petitioner Ferguson had knowledge that this evidence was in the truck or how it got there.

The petitioner Ferguson stopped at the station at approximately 1:30 a.m. and the van-type truck driven by him was searched by officers. (Tr., pp 243-246; 313-314). The officers testified to statements that he made which they infer are conflicting as to his purpose that night. One statement was that he had to come to haul a load of produce and the other was that he had come to help move a person. (Tr., pp 244, 312). In both statements, he was vague as to where the persons could be located.

No fingerprints of the petitioner Ferguson were found on any vehicle or any place at the marina or on any apparatus or bag or any article whatsoever located at the marina even though the officers dusted extensively for fingerprints. (Tr., pp 578-579). The only fingerprints found that involved the petitioner Fergu-

son were fingerprints on the door of the cab of the vehicle that he was operating, (Tr., p 719), which have no probative value to link him to the conspiracy whatsoever.

The petitioner Ferguson was never shown to be present at the marina at any time and was not shown to have known or associated with any of the alleged co-conspirators at any time. In fact, he was coming from the opposite direction from the marina when he turned into the service station or community store. (Tr., p 235). There was a drink box at the station and there is no evidence that the mens room, which was probably there, was closed. (Tr., pp 219, 283-284).

The facts pertaining to the Government's case against Bobby Lee Minton are almost identical with the facts in the Government's case against Samuel E. Ferguson except the van-type truck which was being driven by him came to the intersection at Highway 211 and Highway 133 at approximately 2:00 in the morning and approximately 20 to 30 minutes after Ferguson's truck. When it got to the intersection, it made a right turn onto Highway 133 off of Highway 211. This truck, driven by petitioner Minton, before it made its turn, was like the truck driven by the petitioner Ferguson proceeding down Highway 211 from Supply, North Carolina, towards Southport, North Carolina. (Tr., p 247). After the petitioner Minton turned the truck which he was driving at the intersection down Highway 133, he was waved into the service station parking lot by Officer Thompson. (Tr., p 248). A search by officers revealed about a handful of residue of material, later identified as marijuana, in the back of the van-type truck in the van compartment and about half-way up the side of the truck. (Tr, pp 255-256; 328-332). Like the truck that the petitioner Ferguson was driving, the truck that the petitioner Minton was driving was not registered in his name. (Tr., pp 303, 339). There is no evidence which would indicate that he had knowledge of the marijuana residue which happened to be in the truck or how it got there.

Like the petitioner Ferguson, the truck driven by the petitioner Minton was never shown to be at the marina or closer than approximately five miles. (Tr., p 203).

No fingerprints were ever shown of the petitioner Minton at the scene of the seizure of the 15 tons of marijuana and no evidence was ever introduced which indicated that the petitioner Minton knew any of his co-defendants before his arrest.

Highway 133 not only leads to the access road which branches off to the marina, but it also leads to the inland waterway, Long Beach and Fort Caswell. (Tr., pp 53-54). He was on a public highway and had not branched off as he would have had to do to go into the marina and was, in fact, approximately five miles from that point. There is no evidence whatsoever that shows that the marijuana residue found in the back of the truck had any relationship to the 15 tons of marijuana found at the marina. In fact, as in the case of the petitioner Ferguson, the inference is much stronger that this residue of marijuana had relationship to some other load on some other day and probably hauled by some other person, other than the petitioner Minton.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fourth Circuit has decided a federal question in a way in conflict with an applicable decision of this Court in *United States* v. *Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940), wherein the conviction of jobbers who supplied an illicit distillery was reversed by the Second Circuit Court of Appeals and the United States Supreme Court upheld the reversal stating:

> "Those having no knowledge of the conspiracy are not conspirators; and one who without more furnishes supplies to an illicit distillery is not guilty of conspiracy even though his sale may have furthered the object of the

> conspiracy to which distiller was a party but of which the supplier had no knowledge."

Here, there is no evidence that the petitioners supplied anything at all. There is no evidence that they performed or intended to perform the menial task of unloading and hauling the 15 tons of marijuana at the marina.

Here, there is no direct or even circumstantial proof of the petitioners' intentions. Here, we do not even reach the issue that confronted the government in the Falcone case as to knowledge on the part of one supplying work or materials to an illegal enterprise because no work or materials were ever shown to have been performed or furnished by the petitioners to further the alleged conspiracy.

The government relied upon conspiracy to convict the petitioners on all counts since there was absolutely no evidence of participation unless the alleged conspiracy was proven.

The consent by the petitioners to the searches indicates an anticipation on their part that there was nothing in the van portions of the trucks. If they had knowledge that the trucks had residue of marijuana, they would not have so readily consented. After all, the trucks did not belong to them, according to the uncontested evidence. (Tr., pp 245, 255, 313, 329-332).

The decision of the United States Court of Appeals for the Fourth Circuit against the petitioners not only is contrary to *United States* v. *Falcone, supra,* but the decision imputes guilty knowledge to the petitioners without any evidence that they contributed in any way by any act which furthered the object of the conspiracy involving the 15 tons of marijuana at the marina.

The petitioners respectfully submit that this decision of the United States Court of Appeals for the Fourth Circuit is not only a violation of the salutary rule of law set forth in *United States* v. *Falcone, supra,* but extends the law pertaining to involvement in a conspiracy to allow the government to convict persons of a

charge of conspiracy without having presented any evidence of knowledge of a conspiracy.

This decision of the United States Court of Appeals for the Fourth Circuit is not only contrary to *United States* v. *Falcone, supra,* but allows convictions of the petitioners who were not shown to have furnished anything or participated in any manner whatsoever in the illegal transaction on suspicions aroused because they were within about five miles from where the illegal transaction took place.

In order to correct this dangerous precedent set by the United States Court of Appeals for the Fourth Circuit in this action, a review on writ of certiorari should be allowed.

II. The decision of the United States Court of Appeals for the Fourth Circuit is in conflict with the decisions of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Meyer,* 432 F.2d 1000 (1970) and *United States* v. *Carrion,* 457 F.2d 200 (1972). In *Carrion,* the government attempted to prove that the defendants had smuggled marijuana from Mexico from a matchbook of a Mexican motel found on one of the defendants and a map of Mexico, together with other maps in his flight bag and that a few innocuous words in Spanish were written on a slip of paper in the wallet of another defendant; and that the plane had been airborne long enough and had used enough fuel to have made a round trip to Mexico. The Ninth Circuit Court concluded that the evidence was sufficient to justify an inference that the marijuana came from Mexico, but not that the possessors had smuggled the marijuana from Mexico on that date as charged.

In this case now before the Court, the only evidence of importation is the map found in the pilot house of the Queen Elizabeth. The other evidence relied upon by the government in *Carrion* is not presented here.

Furthermore, the map showed a line drawn to a point outside the twelve mile limit to which the customs territory extends.

The undisputed evidence proved that the line drawn on the map stops at excellent fishing territory (Tr., p 815) (consistent with the Queen Elizabeth's status as a shrimper). The map found on the Queen Elizabeth in this case does not even raise an inference that the marijuana was probably from a foreign territory.

In *Meyer*, the defendant was stopped for a routine immigration search 65 miles north of Mexico. In the trunk were many sodium seconal capsules contained in five boxes, four of which were marked "Mexico, D.F." (Department Federal). On appeal, Meyer's conviction for illegal importation was reversed and the Court said:

> "The most that can be inferred from this evidence is that four of the boxes probably came from Mexico.
>
> * * * * *
>
> [W]hether the seconal capsules were illegally imported are matters of pure conjecture."

Certainly the marking "Purina, Columbia, S.A." (Tr., p 448) on the bags of marijuana found on the Queen Elizabeth had even less significance than the markings on the boxes in *Meyer*.

The allowance of the Fourth Circuit Court of Appeals of such speculative proof in the conviction of the petitioners places the decision in this case squarely contrary to the refusal of the Ninth Circuit Court of Appeals to allow such proof of importation to support a conviction.

The trawler Queen Elizabeth was not on the coast but was on the inland waterway that leads through Florida to Miami. (Tr. pp 41, 79)

Three co-defendants, who have not joined in the petition for writ of certiorari, were Cubans from Miami, Florida and therefore, the overwhelming permissible inference is that the marijuana came up from Miami, Florida which is a known dumping ground for South American marijuana. This inference does not call for conjecture such as is necessary to infer that the trawler

rendezvoused at sea with another vessel. These petitioners assert that the Ninth Circuit was right in its decisions and the Fourth Circuit was wrong in its affirmation of the conviction of the petitioners. The Ninth Circuit was correct in its refusal to allow a map to be a basis for a speculation of importation. The Ninth Circuit was right when it held that even if the boxes of contraband came from Mexico, that the petitioners should not be convicted upon pure conjecture that the contraband was illegally imported.

The decision of the Fourth Circuit Court of Appeals against the petitioners on pure conjecture should be reversed and the conflict between the Fourth Circuit Court of Appeals and the Ninth Circuit Court of Appeals be resolved in favor of the decisions of the Ninth Circuit Court of Appeals, in order to prevent the decision against the petitioners from being precedent in favor of pure conjecture.

III. The Fourth Circuit Court of Appeals, in conflict with decisions of the Second and Sixth Circuit Courts of Appeals, affirmed the judgment of conviction of the petitioners, and allowed the government to bolster a weak case by showing statements of the petitioners which, on Page 18 of the decision, it stated "lay somewhere between the highly implausible and the flagrantly false."

Actually, the statements of neither of the petitioners were ever shown to be false. (Tr., pp 244, 254, 312). However, assuming, for the sake of argument, that the Fourth Circuit Court of Appeals is correct that the statements "lay somewhere between the highly implausible and the flagrantly false," its decision affirming the conviction of the petitioners is in conflict with the Second Circuit in *United States* v. *Johnson*, 513 F.2d 819 (1975). In that case, the defendant Johnson, who was a lifelong friend of a person named Loewe, went with Loewe to Canada and stayed with him for a while and came back to the United States with him; but there was no evidence that he knew

that Loewe had purchased and hid methamphetamine in the door cavity of the car. After the officers found the methamphetamine, they questioned the defendant Johnson and he lied. The Second Circuit Court of Appeals, in reversing the conviction of the defendant Johnson, stated that there must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed.

The Court, in *United States* v. *Johnson,* supra, rejected the government's contention that it could bolster a weak case by showing falsehoods told by a defendant to extricate himself.

In *United States* v. *Sizemore,* 632 F.2d 8 (1980), the defendant Frank Sizemore was charged with possessing an unregistered device in violation of 26 U.S.C. 586(d), 5861(f), and 5871. He was at the scene of the crime. He had bruises and scratches on him but there was no evidence that he had any control over the explosive device. He admitted he made false statements which could have been made to protest his uncle or avoid guilt by association. The Sixth Circuit Court of Appeals reversed and said:

> "That Frank lied when questioned by ATF agents is relevant but does not by itself prove he took part in the venture."

Here, the Fourth Circuit Court of Appeals did exactly what the Second and Sixth Circuit Courts of Appeals states could not be done. They bolstered a weak case against the defendant with statements which they labeled implausible.

To involve these petitioners with evidence outside the so-called implausible statements, the Court had to engage in an impermissible inference upon an inference that the van-type trucks — which petitioners did not own (Tr., pp 288, 303, 339, 498) — had hauled a load of marijuana previously from the marina and then infer that the petitioners were the haulers. Also, the Court must ignore that Highway 211 leads to Southport and that the petitioner Ferguson had not deviated from that

route by pulling into the service station yard. (Tr., p 235). He was not stopped by the officer at the roadblock but stopped at his own free will. (Tr., p 285). The most probable reason for his stopping was to get a drink from a drink machine which was there, or to visit the mens room which was also there. (Tr., p 219, 283-284).

The petitioner Minton did turn the corner onto Highway 133 but he was so close to the intersection that there is a reasonable inference that he had done what many other persons have done on more than one occasion — made a wrong turn. (Tr., pp 232, 247, 248).

There is also the reasonable inference that both petitioners were engaged in some activity unrelated to the marijuana and were reluctant to account for this activity to the officers.

Also, it is respectfully submitted that being on Highway 133 is not an incriminating circumstance in itself since this highway led to Long Beach, Fort Caswell and the inland waterway. (Tr., pp 53-54).

That no fingerprints of the petitioners were found at the marina speaks loudly against their involvement in this illegal transaction, especially since other defendants left fingerprints at the site. Also, no threads of an incriminating nature were found on the petitioners' clothing as were found on other defendants.

The petitioners respectfuly submit that the Second Circuit, in *United States* v. *Johnson, supra,* and the Sixth Circuit, in *United States* v. *Sizemore, supra,* were right and that the Fourth Circuit, in this case against petitioners, was wrong and that the government should not be allowed to bolster a weak case by statements made, implausible or false, by petitioners in an attempt to extricate themselves. This conflict between the Circuit Court of Appeals should be resolved in favor of the petitionerws and to this end, a review on a writ of certiorari should be allowed.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit should be allowed.

Respectfully submitted,

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APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 81-5006

UNITED STATES OF AMERICA,

Appellee,

v.

VICTOR JACOB SENI,

Appellant.

No. 81-5007

UNITED STATES OF AMERICA,

Appellee,

v.

BOBBY LEE MINTON,

Appellant.

No. 81-5008

UNITED STATES OF AMERICA,

Appellee

v.

SAMUEL ELLIS FERGUSON,

Appellant

No. 81-5009

UNITED STATES OF AMERICA,

Appellee,

v.

HECTOR MORALES,

Appellant.

No. 81-5010

UNITED STATES OF AMERICA,

Appellee

v.

CARLOS FIUSA,

Appellant.

No. 81-5011

UNITED STATES OF AMERICA,

Appellee,

v.

PABLO RAUL ALONSO,

Appellant.

Appeals From The United States District Court For The Eastern District Of North Carolina, At Wilmington. W. Earl Britt, District Judge

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Argued June 5, 1981 Decided October 26, 1981

Before PHILLIPS and MURNAGHAN, Circuit Judges, and Williams,* District Judge.

Irvin B. Tucker, Jr.; Paul Morris (William A. Clay; Oscar Rodriguez on brief) for Appellants; Patricia L. Holland, Assistant United States Attorney (James L. Blackburn, United States Attorney, Richard Tatum Gammon, Third Year Law Student on brief) for Appellee.

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*The Honorable Richard L. Williams, United States District Judge for the Eastern District of Virginia, sitting by designation.

MURNAGHAN, Circuit Judge:

In the early morning of July 9, 1979, law enforcement officers converged on the Queen Elizabeth, a shrimping trawler docked at the Oak Island Marina in Brunswick County, North Carolina. On board the officers found 15 tons of marijuana, apparently in the process of being unloaded. Finding no one in the immediate vicinity, the officers set up a roadblock on Highway 133 about 5 miles from the marina. Defendant Ferguson was arrested at about 1:40 a.m. as he approached the roadblock in a large van. Defendant Minton was arrested about half an hour later as he approached the roadblock in another van.

Officers at the marina began a thorough search of the area. At about 6:30 a.m., they found defendants Seni and Morales hiding in clumps of bushes. Under questioning, Seni told the officers that he and others involved had been staying at a motel in Wilmington, North Carolina. The motel was placed under surveillance. Defendants Alonso and Fiuza were arrested as they returned to the motel that evening.

Those six defendants, and a seventh defendant, Henderson, were charged with conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 963, 841(a)(1) and 18 U.S.C. § 2 (count I); unlawful importation of marijuana in violation of 21 U.S.C. §§ 952(a), 960(a)(1) and 18 U.S.C. § 2 (count II); and possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The six defendants were convicted on all counts. A mistrial was declared with regard to Henderson.

As anyone compelled by the nature of his work frequently to review drug convictions knows, a plethora of ingenious defenses followed the indictments. To clear the decks for consideration of several serious contentions involving rather close questions, we first dispose of the easier ones.

I.

Adequacy Of Jury Instructions

a. *Instruction On Importation*. Assuming that importation of the marijuana has been proven (a disputed issue which we later

address), nevertheless the defendants argue that the district court incorrectly instructed the jury concerning importation. They argue that the court's instruction incorrectly gave the impression that the jury could convict the defendants of importation if the jury found no more than that the marijuana had, at some previous time, been imported, rather than making it clear that a finding was necessary that the defendants themselves imported it.

The argument is without merit. Unquestionably the prosecution must prove that the defendants imported the marijuana; proof simply that the marijuana was imported is insufficient. *See, e.g., United States* v. *Moler*, 460 F.2d 1273 (9th Cir. 1972). Considered as a whole, however, the court's instruction plainly requires the jury to find that the defendants imported the marijuana. The court instructed the jury that the prosecution must prove three elements to establish importation: (1) the marijuana was in fact imported, (2) the importation was done knowingly and willfully, and (3) the defendant willfully associated himself with the venture. The defendants' argument makes sense only if the first element is read separately from the second and third. But the third element clearly refers to the first — each defendant must have wilfully associated himself with a venture to import marijuana.

b. *Instructions on the Objects of the Conspiracy*. The trial court instructed the jury that it could convict a defendant of conspiracy if it found that the defendant had conspired with any other person "to commit an offense against the United States in violation of the general laws relating to marijuana." The defendants argue that the general nature of the instruction on conspiracy required the court to give adequate instructions on the objects of the conspiracy, importation and possession with intent to distribute. They argue that the court did not give adequate instructions on the objects of the conspiracy, thereby requiring a new trial under *U.S.* v. *Head*, 641 F.2d 174 (4th Cir. 1981).

The argument fails for two reasons. First, a review of the record shows that the court specifically instructed the jury on the objects of the conspiracy at several points in the instructions. Second, the defendants' reliance on *Head* is misplaced. The tria court in *Head* instructed the jury that to convict the defendant of conspiracy, the jury

did not have to find that the defendant conspired to violate all three substantive counts, but did have to find that the defendant conspired to violate at least one of the substantive counts. The appellate court recognized that the acts alleged in two of the substantive counts occurred largely at a time outside the statute of limitations period. The court ordered a new trial because it could not determine from the general verdict or the general nature of the conspiracy instructions the counts on which the defendant had been convicted. No problem even remotely similar to *Head* exists here. The court's instructions on conspiracy, importation, and possession with intent to distribute were proper.

II.

Admissibility Of Seni's Statements To Police Officers.

Seni was discovered when one of the officers saw his leg protruding from a clump of bushes at the marina. The officer drew his gun, identified himself as a police officer, and ordered Seni to come out with his hands on his head. Seni was arrested, handcuffed, and read his rights. Seni said that he understood his rights. He then told the officer that he "did it" because the money was good and fast. Seni was placed in the back of a police car, advised of his rights again, and interrogated. Seni told the officers that he and several other people had been unloading the marijuana when the police arrived, and that they ran and hid. Seni also said that he had become involved in the operation in Miami, and that someone he did not know had paid for room 259 and an adjacent room at the Rodeway Inn in Wilmington, where he and others involved had been staying. [1]

a. *Voluntariness of the Statements*. Seni argues that his statement that he "did it" should have been suppressed at trial because it was involuntary, and that his subsequent statements should have been

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[1] Seni could not remember the name of the motel, but the officers identified the motel from a matchbook in Seni's pocket. Apparently Seni did not remember the number of his room, 259, and told the officers that others involved had been staying in the adjacent room. It is uncertain from the record whether Seni mentioned the adjacent room 257 by number.

suppressed as fruit of the first statement. Seni argues that his first statement was involuntary because the officer had handcuffed him and was pointing a gun at him at close range when he made the statement.

Seni's argument is without merit. Neither a drawn gun, *see United States* v. *Wertz*, 625 F.2d 1128, 1137 (4th Cir. 1980), *cert. denied*, ____ U.S. ____ (1981), nor handcuffs, *see United States* v. *Ogden*, 572 F.2d 501, 503 (5th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978), establish involuntariness in and of themselves. An incriminating statement is involuntary only if induced by such duress or coercion that the suspect's "will has been overborne and his capacity for self-determination critically impaired," *United States* v. *Wertz*, 625 F.2d at 1133, quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). Involuntariness is a question of fact to be determined from "the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation." *United States* v. *Wertz*, 625 F.2d at 1133-34, quoting *Schneckloth* v. *Bustamonte*, 412 U.S. at 226.

The totality of the circumstances supports the trial court's conclusion that the statement was voluntary. Seni had been read his rights moments before, and said that he understood them. [2] Seni did not the make the statement in response to a question but simply offered it. He does not allege that a lack of education, maturity, or intelligence deprived him of the ability to choose to remain silent.

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[2] Citing *Dunaway* v. *New York*, 442 U.S. 200 (1979), and *Brown* v. *Illinois*, 422 U.S. 590 (1975), Seni argues that the fact that he had been read his rights does not establish voluntariness. *Dunaway* and *Brown*, however, state that the fact that a suspect has been read his rights does not attenuate the taint between an illegal arrest and a subsequent confession or consent to a search. *Dunaway* and *Brown* are based on the rationale that the exclusionary rule serves interests and policies under the Fourth Amendment that are distinct from the policies it serves under the Fifth Amendment. *See* 442 U.S. at 217, 422 U.S. at 601. Whether a suspect has been read his rights remains a circumstance to be considered in determining voluntariness for Fifth Amendment purposes.

b. *Admissibility Against Other Defendants*. The other defendants argue that Seni's statements implicating others in a conspiracy were admitted in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968). *Bruton* held that admission of a nontestifying defendant's confession which incriminates codefendants violates the codefendants' right to cross-examination. Subsequent to *Bruton*, however, numerous courts have held that a defendant's confession may be admitted at a joint trial if references to the identity of codefendants are redacted. *See United States* v. *Belle*, 593 F.2d 487, 493 (3d Cir. 1979), *cert. denied*, 442 U.S. 911 (1979) and cases cited therein. The trial court here carefully redacted all references that would identify the other participants in the conspiracy, and cautioned the jury that it was to consider the statements only against Seni. No violation of the *Bruton* rule occurred.

III.

Stop, Frisk And Arrest Of Alonso And Fiuza.

After Seni revealed that he and others involved had been staying in room 259 and an adjacent room of the Rodeway Inn in Wilmington, the rooms were placed under surveillance while the officers sought a search warrant. At about 6:40 on the evening of the day Seni was arrested, the officer watching the rooms saw Alonso and Fiuza walk across the motel lawn to the motel office. Alonso entered the office, came out, and handed Fiuza what appeared to be a room key. Alonso and Fiuza walked to room 257; Fiuza went inside for about two minutes while Alonso waited outside. As Alonso and Fiuza walked back across the parking lot, the officer approached them with his gun drawn, stopped them, and identified himself. The officer noticed that Alonso and Fiuza had mud on their pants and scratches on their arms. The officer asked Alonso and Fiuza for identification. Both produced Florida drivers' licenses. The officer then told Alonso and Fiuza to walk over to the officer's truck, and to lean against the truck so that the officer could frisk for weapons. As the officer conducted the frisk, Fiuza dropped the key to room 257 into the bed of the truck. The officer detained Alonso and Fiuza until a back-up unit arrived. Alonso and Fiuza were then arrested.

Alonso and Fiuza argue that because the officer approached them with his gun drawn, required them to walk over to his truck, and frisked them, the initial stop constituted an arrest without probable cause. They also argue that, even if the initial stop was no more than a *Terry* stop, the officer had no reasonable suspicion of criminal activity. Alonso and Fiuza argue that under either a probable cause or a reasonable suspicion standard, the evidence developed subsequent to the stop should have been suppressed at trial. [3]

We find nothing improper about the stop, frisk, and arrest of Alonso and Fiuza. The fact that the officer drew his gun and frisked Alonso and Fiuza for weapons does not necessarily elevate the stop into an arrest. Courts have held that an officer may draw his gun and conduct a frisk when justified as a reasonable precaution for protection and safety. *See, e.g., United States* v. *Thompson*, 558 F.2d 522 (9th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *United States* v. *Worthington*, 544 F.2d 1275, 1280 n.3 (5th Cir. 1977), *cert. denied*, 434 U.S. 817 (1977) (based upon experience with drug traffickers, agents reasonably feared death or serious injury when they stopped plane on dark, deserted airstrip). Under the circumstances here, drawing the gun was a reasonable safety precaution, and the stop, therefore, was valid under *Terry* v. *Ohio*, 392 U.S. 1 (1968), if the officer had a reasonable suspicion of criminal activity.

Alonso and Fiuza argue that their arrival at room 257, more than 50 miles from the marina and more than 18 hours after the police converged on the Queen Elizabeth, does not establish a reasonable suspicion of criminal activity. It is important to note, however, what is at issue here. This is not a situation in which a police officer sees suspicious activity that may or may not involve a crime, and detains a suspect briefly to determine whether a crime occurred. The officer here knew that a crime had occurred. The question is whether the officer could reasonably suspect that Alonso and Fiuza were participants in the crime simply because Fiuza entered room 257 while Alonso waited outside. We think the officers' suspicions were

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[3] The evidence consisted of marijuana residue on their clothes, and their fingerprints, which matched prints at the marina.

reasonable. The officer had reliable information from a participant in the crime [4] that other persons involved had been staying in room 259 and an adjacent room of the Rodeway Inn. A check with the motel office earlier in the day revealed that the same person had rented both rooms from July 7 through 12 noon on July 9. The rooms had not been rerented, and had been under surveillance since early that morning. From this information the officer could reasonably suspect that anyone entering the rooms may have been a participant in the crime, and could detain the person briefly to resolve his suspicion. After stopping Alonso and Fiuza, the officer saw the mud on their pants and scratches on their arms. Their appearance, in conjunction with Fiuza's attempt to discard the room key, tended to confirm their identities as participants, and provided probable cause to arrest.

We now have arrived at the three hardest questions raised.

IV.

Sufficiency Of The Evidence Of Conspiracy.

Each defendant argues that the evidence was insufficient to link him to the conspiracy. The arguments of Seni, Morales, Alonso, and Fiuza are predicated in part on their related challenges that some evidence against them should have been suppressed. [5] Because the evidence was properly admitted, there was sufficient evidence from which the jury could find each defendant guilty beyond a reasonable doubt. [6]

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[4] Participation in a crime establishes reliability of information for purposes of a search warrant. *See, e.g., United States* v. *Dunloy*, 584 F.2d 6, 10 (5th Cir. 1978).

[5] *See* II, III, *supra*.

[6] Seni and Morales were found hiding in bushes at the marina. Fibers were found on Seni's and Morales' clothes that were consistent with the burlap wrapped around the bales of marijuana. Seni's fingerprints were found on one of the cars at the marina. Seni also made numerous incriminating statements. Alonso and Fiuza were arrested at the Rodeway Inn where participants had been staying. They had mud on their pants, scratches on their arms, and marijuana residue was found on their clothes. Alonso's fingerprints were found on a can in the galley of the Queen Elizabeth, and Fiuza's fingerprints were found on three vehicles seized at the marina. The evidence was sufficient to convict each.

Ferguson and Minton have a stronger argument. The evidence against them was as follows. After the police discovered the Queen Elizabeth at the Oak Island Marina, with 15 tons of marijuana partially unloaded, they set up a roadblock late at night approximately 5 miles west of the marina on Highway 133. The roadblock was set up about 100 yards east of the intersection of Highways 211 and 133, *i.e.*, in the direction towards the marina. A short time later, at about 1:40 a.m., a 2-1/2 ton van-type truck, similar to trucks into which offloading had been taking place at the marina, traveling north on 211, pulled into a service station located at the intersection, and proceeded across the station parking lot toward Highway 133. The truck stopped when its lights revealed the roadblock. An officer approached the truck, and talked to the driver, defendant Ferguson. Ferguson told the officer he was heading to Southport to pick up produce. Moments later, he told another officer he was heading to Southport to help a friend move, but did not know the friend's name or where he was to meet the friend. A consent search revealed about a "handful" of marijuana residue in the back of the truck.

About one-half hour later, a second 2-1/2 ton van-type truck, driven by Minton, pulled from Highway 211 onto Highway 133 and stopped at the roadblock. Minton told officers he was on his way to Southport to pick up mattresses, but did not know the name of the mattress company. A search of the truck revealed marijuana traces on the floor and on the braces halfway up the side of the truck.

No other evidence was introduced to link Ferguson and Minton to the conspiracy. Their fingerprints were not found at the marina, and they were not linked in any other way to any of the other conspirators. Although the evidence against them is not overwhelming, the contention that it is insufficient rapidly loses its surface plausibility when pertinent additional details are taken into account:

A. Ferguson and Minton were stopped at the intersection of Highways 133 and 211 at the very time when persons would be expected to show up at the marina to take delivery of marijuana.

B. Highway 133 led to few, if any, destinations other than the marina itself in the 5-mile stretch between the intersection and the marina.

C. Ferguson had committed himself to turn into a closed service station at the intersection of Highways 211 and 133 before coming to a halt in consequence of the roadblock. Minton had also turned from Highway 211 onto Highway 133.

D. Both proclaimed their destinations to be Southport, but that objective could be reached only by following Highway 211 north. Highway 133 did not lead to Southport.

E. Each of them gave explanations of what he would be seeking to accomplish in Southport which lay somewhere between the highly implausible and the flagrantly false.

F. The marijuana residues located in their vans (which in each case was of a size and design consistent with two other trucks located at the marina and engaged or awaiting engagement in the transportation) fitted well with a conclusion that the trucks had recently been loaded with marijuana, driven to a destination, unloaded, and were returning for another load.

In short the evidence was sufficient to sustain conviction of Minton and Ferguson. [7]

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[7] Ferguson and Minton aruge that the evidence against them is comparable to the evidence in *United States* v. *Palacios*, 556 F.2d 1359 (5th Cir. 1977) and *United States* v. *Stroupe*, 538 F.2d 1063 (4th Cir. 1976), in which conspiracy convictions were reversed. In neither *Palacios* nor *Stroupe*, however, was there independent evidence of a conspiracy. Each case involved two persons; the prosecution attempted to prove that one of the persons knew of and conspired with respect to the illegal activities of the other (other persons were indicted in *Stroupe*, but, because the prosecution acknowledged that those persons were involved in an independent conspiracy, the conspiracy at issue involved only two persons, 538 F.2d at 1066). Here the existence of a conspiracy was established by independent evidence. Once the existence of a conspiracy is established, the evidence need only establish a slight connection with the conspiracy. *See United State* v. *Laughman*, 618 F.2d 1067, 1076 (4th Cir. 1980), *cert. denied*, 447 U.S. 925 (1980). The evidence here established that connection.

V.

Rejected Request For Instruction As To The Lesser Included Offense Of Possession.

At trial, each defendant requested an instruction on the lesser included offense of possession of marijuana. Certainly for defendants Seni, Morales, Alonso, and Fiuza the reed is slender and frail. An instruction on a lesser included offense is proper when the greater offense requires the jury to resolve a disputed factual element which is not required for conviction of the lesser included offenses. *See United States* v. *Rogers*, 504 F.2d 1079 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). If Seni, Morales, Alonso, and Fiuza were guilty of possession, it was possession of the 15 tons of marijuana. That amount of marijuana is sufficient to establish intent to distribute. *See, e.g., United States* v. *Laughman*, 618 F.2d 1067, 1074 n.7 (4th Cir. 1980), *cert. denied*, 447 U.S. 925 (1980). The jury reasonably could not find the defendants guilty of possession without also finding them guilty, in view of the large quantity of marijuana, of possession with intent to distribute. No instruction on the lesser included offense of possession was required. *See United States* v. *Henley*, 502 F.2d 585, 586 (5th Cir. 1974) (possession of seven tons of marijuana justified trial court's refusal to instruct jury on lesser included offense of simple possession).

Ferguson and Minton make a facially appealing argument that they were entitled to an instruction on possesion because the jury could have found them guilty of possessing the small amounts of marijuana in the back of each truck without also finding that they were part of the conspiracy. On reflection, however, it appears that Ferguson and Minton confuse a lesser included offense with a separate offense. Ferguson and Minton were charged with possession of the 15 tons of marijuana at the marina with intent to distribute. The marijuana in the back of each truck was part of the evidence linking them to the 15 tons of marijuana. If the evidence established the link, Ferguson and Minton were no more entitled than any of the other defendants to an instruction on a lesser included offense. The jury could not reasonably find that they possessed the 15 tons of marijuana without also finding that they intended to distribute.

To argue that they were entitled to an instruction on simple possession, Ferguson and Minton implicitly have to argue that the marijuana in the back of the trucks was different marijuana than the marijuana at the marina. Under these circumstances, however, Ferguson and Minton would have committed a separate offense, not a lesser included offense. They were not entitled to the instruction they requested.

VI.

Sufficiency of the Evidence of Importation.

Here we come, at last, to the strongest argument for the defendants. It is made by all six of them. That importation occurred should not be difficult to establish, since the undetected growing in the United States of quantities of marijuana sufficient, undetected, to produce a crop of 15 tons presumably is extremely difficult, if not impossible.[8] The bales of marijuana bore Spanish markings indicating that they originated in a foreign country.

But the government's burden was significantly greater than simply proving importation, without identifying the importers. It had to show that the particular defendants conspired to do the importing.[9] Looking at the question as a novel one, without regard to decided cases dealing with similar factual situations, we are content that the conspiracy was abundantly proven, and that an accomplished object of the conspirators was the importation.

Navigational charts of the trawler were, in general, stored below. One chart, however, was in the pilot house, inferring use in the most recent setting of courses for the vessel. A track line appeared on it showing successive times and dead reckoning positions of a vessel traveling from the North Carolina coast to a position in excess of 120 miles off the coast of North Carolina. That distance was well in excess of the twelve miles customs limit which governs here for purposes of

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[8] *Contrast United States* v. *Carrion*, 457 F.2d 200 (9th Cir. 1972), involving 404 pounds (1/5 of a ton) on a plane which landed at a Los Angeles airport.

[9] *See* Ia., *supra*.

determining whether there had been importation. The inference that the vessel sailed out from North Carolina, across the 12 mile limit permits, indeed virtually compels, the further inference that the trawler sailed back. It was found at the marina on the North Carolina coast.

The jury could, therefore, reasonably conclude that the most recent journey made by the trawler, with its most recent cargo, 15 tons of marijuana, was one involving importation. The circumstances of the apprehension of some of the conspirators in close proximity to the vessel allowed the further inference that they had had a hand in the operation of the trawler, directly or as charterers.

Further confirmation of those permissible inferences derived from the presence of markings in Spanish, indicating origination from outside the United States, affixed to the bales of marijuana.

No case brought to our attention precludes our abiding by the decision compelled by logic that involvement in the importation by the conspiracy defendants was adequately made out. The defendants rely principally on *United States* v. *Carrion*, 457 F.2d 200 (9th Cir. 1972), where a plane landed at a Los Angeles airport carrying 404 pounds of marijuana. The marijuana was contained in boxes bearing Spanish writing; one of the defendants had a map of Mexico (together with other maps) in his flight bag, [10] and a matchbox bearing the name of a Mexican motel in his pocket; the plane had used enough fuel for a round trip to Mexico. The court held the evidence insufficient to establish importation beyond a reasonable doubt, saying that at most the evidence was consistent with a claim of importation. The defendants argue that there is even less evidence of importation here than in *Carrion*, because the only evidence of importation is the navigational chart. The defendants further emphasized that the area 120 miles off shore was an excellent fishing area.

However, an airplane's mobility is far greater than that of a trawler operating on the ocean. The possibility of a plane trip anywhere, especially including a trip solely within the United States, was not

[10] The maps contained no indication of any journey, no marking of any positions.

ruled out. [11] Nor was the possibility excluded, even if the plane went to Mexico, of an intermediate, interrupting stop or stops on the return from Mexico under circumstances which would break the journey and end the importation. In the present case, however, a surface vessel travelling the North Atlantic had not the same flexibility. It is reasonable to infer from an apparently unbroken journey from North Carolina to a point 120 miles off the coast that the same type journey was made on the return, after meeting a ship in international waters and transferring the 15 tons of marijuana later located in the trawler's hold. *Carrion* has been characterized as "borderline." *United States* v. *Childs*, 457 F.2d 173 (9th Cir. 1972). What takes the present case over the border is the presence of the navigational chart, marked to show a journey outside the territorial waters for which there was no counterpart in the factual situation of *Carrion*. *Cf. United States* v. *Odiorne*, 590 F.2d 158 (5th Cir. 1979) (ship's log showed it had sailed from Dutch Antilles to Columbia to intercoastal waterway off Georgia; navigational chart exhibited mark in area of Riohacha, Columbia).

Of course, if a boat is encountered in territorial waters, and the only evidence advanced to support a claim of importation is the size of the boat and the quantity of marijuana, that is not enough. *United States* v. *Soto*, 591 F.2d 1091, 1104 (5th Cir. 1979), *cert. denied*, 442 U.S. 930 (1979) ("There is no evidence that the 'Captain Salty' ever went outside the territorial waters of the United States or met with any other craft that had. The only evidence which even suggests that the contraband was imported is the size of the shrimp boat and the quantity of marijuana in the cache found to have been transported by the 'Captain Salty.'"). But here we have, in addition, evidence of a recent, unbroken international trip, and that is the crucial difference.

Accordingly, the judgments are

AFFIRMED.

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[11] The Court observed:

> There was no evidence that the aircraft had been seen in Mexico. The fact that is had used enough fuel and had enough time to make the trip to Mexico does not raise any inference that Mexico had been its destination.

457 F.2d at 201-02.